be accompanied by 'associated buildings' that would also be exempt from zoning requirements, and even building restrictions." Comments of the City of Suffolk, Virginia, at 3. The City was rightfully concerned that its ability to "require mitigating actions such as screening, privacy fencing, storm water control or other general accepted methods" to lessen the impact of the facilities on the environment would be preempted by the proposed rule. Id. The same concerns were echoed by Congressman Thomas J. Bliley, Jr. His comments assert that the sites of broadcast towers "could then contain one or more large buildings, parking facilities, exterior lighting, etc., all of which would be exempt from local zoning and/or building regulations." Comments prepared for Congressman Thomas J. Bliley, Jr., at 7. This would preclude local government from requiring "mitigating actions such as screening, privacy fencing, landscaping, storm water control, egress to the property, or other generally accepted methods of lessening the impact of the facility on the adjoining landowners and community." Id. Clearly, the inclusion of "associated buildings" within the proposed rule increases significantly the potential for adverse environmental impact.

Closely related to environmental concerns are public safety issues. Extensive comments were submitted by numerous aeronautical and pilot associations regarding the risks inherent in any preemption of state and local rules designed to ensure aviation safety. Considering that some of the broadcast towers will have a height in excess of 2,000 feet -- taller than any other man-made structures -- the risk to air craft of all types is readily apparent even to laymen. Such structures can present dangerous obstructions to aeronautical navigation and airport operations. See, e.g., Comments of the National Association of State

Aviation Officials (noting the hazards to aircraft and passengers, the encroachment of navigable air space, and the reduction of area available for landing, take-off and maneuvering).

The concerns of public safety also implicate pedestrians and others on the ground. The comments of the National League of Cities cite three different situations where broadcast towers have crashed, with consequent loss of human life: the crash of seven towers in Minnesota and North Dakota during the course of a storm earlier this year, the crash of the 1,550-foot tower in the Dallas-Fort Worth area in October of 1996, and the recent crash of a broadcast tower in Jackson, Mississippi only weeks ago. See Comments of the National League of Cities, et al., at 26. Because public safety is a critical dimension of the "quality of the human environment," these concerns fall squarely within the penumbrae of NEPA.

But perhaps the clearest indication that the Commission's proposed rule implicates NEPA is evident in the comments submitted by various broadcasting companies. A number of those comments are quite critical of the expense and delay associated with environmental impact statements required by various state counterparts of NEPA. The Comments of Fant Broadcasting Company of Ohio and Fant Broadcasting Company of Massachusetts, for example, criticize the State Environmental Quality Review Act ("SEQRA"), effective in the state of New York, even while acknowledging that the statute is modeled after NEPA and in many cases "has been very useful in modifying projects during the review process in response to legitimate environmental concerns." Comments of Fant Broadcasting Company of Ohio, et. al., at 2. See also Comments of Children's Broadcasting Corporation, at 2,

claiming an expenditure of over $240,000 in order to comply with various county requirements (including the preparation of environmental reports) in connection with the relocation of its transmission facilities. Even as broadcast companies such as these are seeking to avoid state and local regulation, communities such as the City and County of San Francisco have expressed their concern that the proposed rule would preclude cities from complying with their obligations under the California Environmental Quality Act (that state's counterpart of NEPA). See Comments of the City and County of San Francisco, at 12. But that is precisely the point. If the proposed rule is intended to bypass the state counterparts of NEPA (such as the New York's SEQRA and California's CEQA), then a fortiori the Commission's proposed rule will have a significant effect on the quality of the human environment, such that an Environmental Impact Statement is required.

If there was any doubt about this matter, the comments of the Named State Broadcasters' Associations clearly dispels it. Reflecting the position of some 24 different broadcasters' associations, those comments include recommended changes to the Commission's proposed rule. Among other changes, the associations request the addition of the following language expanding the rule's preemptive scope by prohibiting any state or local government or instrumentality from denying (or delaying the disposition of, or conditionally granting) a request to place a broadcast facility on the basis of:

> Any environmental matter involving officially designated wilderness areas, wildlife preserves, threatened or endangered species wildlife habitats, historical sites listed or eligible for listing in the National Register of Historical Places, Indian religious sites, 100-year floodplains as determined by the Federal Emergency Management

> Agency ("FEMA"), flood insurance rate maps, significant changes in surface features (such as wetland fills, deforestation or water diversion).

Comments of Named State Broadcasters Associations, Exhibit A, at 2. The specificity of this proposed language clearly evinces the broadcasters' desire to avoid regulations pertaining to the most sensitive of environmental and aesthetic sites. The broadcasters could not have telegraphed their intentions more clearly. The Commission's proposed rule will have a significant impact on the environment. The requirements of NEPA, including the preparation of an Environmental Impact Statement, are clearly mandated under these circumstances.

## X. CONCLUSION

For the reasons set forth above, CCO respectfully requests that this Commission terminate this proceeding without adopting the proposed rule. Should any rule be adopted it must be modified in the manner described above.

Respectfully submitted,

CONCERNED COMMUNITIES AND ORGANIZATIONS

Dated: November 28, 1997

By: _____
John W. Pestle
Patrick A. Miles, Jr.
Dale R. Rietberg
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Their Attorneys

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## CERTIFICATE OF SERVICE

I, Nikki Klungle, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 28th day of November, 1997, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 814
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
1919 M Street, NW, 8th Floor, Rm. 802
Washington, DC 20554

The Honorable Michael Powell
Commissioner
1919 M Street, NW, 8th Floor, Rm. 844
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
1919 M Street, NW, 8th Floor, Rm. 826
Washington, DC 20554

The Honorable Susan Ness
Commissioner
1919 M Street, NW, 8th Floor, Rm. 832
Washington, DC 20554

Mr. Keith Larsen
Assistant Bureau Chief for Engineering
Policy & Rules Division
Mass Media Bureau
Federal Communications Commission
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Ms. Susanna Swerling
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Mr. Roy J. Stewart
Chief
Mass Media Bureau
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Mr. Thomas Power
Legal Advisor to Chairman Kennard
Federal Communications Commission
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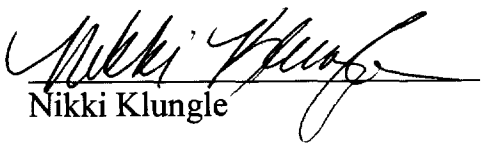

Nikki Klungle

**ATTACHMENT A**

**AFFIDAVIT FROM MICHAEL A. BUCEK**

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Preemption of State and Local Zoning and | ) | MM Docket No. 97-182 |
| Land Use Restrictions on the Siting, | ) | |
| Placement and Construction of Broadcast | ) | |
| Station Transmission Facilities | ) | |

**AFFIDAVIT OF MICHAEL A. BUCEK**

State of Texas §
County of Denton §

BEFORE ME, the undersigned authority, personally appeared Michael A. Bucek, who, being by me duly sworn deposed as follows:

My name is MICHAEL A. BUCEK. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the First Assistant City Attorney for the City of Denton, Texas and the legal advisor to the City's Planning and Zoning Commission.

Page 6 of "Comments of Association of America's Public Television Stations and the Public Broadcasting Service" (KERA/KDTN) contains misleading allegations which read as follows:

> North Texas Public Broadcasting, Inc., licensee of Station KERA, Dallas/Ft. Worth, Texas and Station KDTN, Denton, Texas, encountered local regulators' resistance to its attempt to purchase property to construct a DTV tower. The station located a 60-acre undeveloped tract surrounded by undeveloped land, bought a six-month option from the owner, and filed for FAA approval and rezoning. The municipal council denied the rezoning application and then imposed a 120 day moratorium on all tower-related zoning applications and building permits. During the moratorium, the station's six-month option for the land expired. The council then adopted, for the first time ever, broadcast facility construction regulations that make building, modifying and operating towers very difficult. Additionally, the council annexed unincorporated land outside city limits that might also have been suitable for building a DTV tower.

As a result of these comments, the City of Denton, Texas ("Denton") received a public inquiry regarding the existence of a moratorium in Denton on "building, modifying and

operating towers." No such moratorium exists in the City of Denton, and Denton's City Manager requested I conduct an investigation to determine if KERA/KDTN were denied building permits in Denton or Dallas/Ft. Worth on some other basis. I attended a meeting on Wednesday, November 19, 1997 of the North Central Texas Council of Governments ("NCTCOG") relating to zoning and safety standards for towers, and inquired about the existence of the KERA/KDTN fact situation with staff members from various cities within the Dallas/Ft. Worth area. The inquiry was not fruitful, so I next contacted the Dallas City Attorney's office, and was advised that neither KDTN nor KERA had requested a permit to construct a tower in the City of Dallas. I then contacted the City of Cedar Hill, Texas ("Cedar Hill"), since personally I knew there was a glut of towers in Cedar Hill and remembered hearing about the collapse of a television tower killing three workmen in Cedar Hill in 1996. I thought this type of tragedy could result in a moratorium to determine what type of guidelines might be necessary to adopt to better protect human life.

Cedar Hill staff informed me that Cedar Hill has an area zoned for a "tower farm." This area consists of 11 major towers accommodating 11 TV stations and 21 radio stations. The tower farm area contains acreage which will allow for additional towers, and many existing towers can accommodate additional TV and radio antennas. In 1997, Cedar Hill implemented a moratorium of short duration in order to adopt standards for construction and maintenance of steel antenna towers and antenna supporting structures. This moratorium was in response to the collapse of a tower that killed three workers and occurred in late 1996 when a new antenna for KXTX-TV (Channel 39) was being installed. This tower failure raised concerns for the health, safety, and general welfare of the citizens of Cedar Hill since the collapse of the tower was witnessed by many citizens who were attending an annual outdoor festival in close proximity of the Channel 39 tower. Cedar Hill has also experienced a plane and a helicopter hitting towers in its community. Rather than construct a tower in the area of Cedar Hill zoned for a tower farm or co-locate on an existing tower, KERA/KDTN sought to rezone a tract of land in Cedar Hill for a tower. Cedar Hill's Planning and Zoning Commission ("P&Z") recommended denial of KERA/KDTN's rezoning request without prejudice. Under Texas law, only the City Council can rezone property, and P&Z recommendations are many times overturned by the City Council. KERA/KDTN never completed the zoning process since it never requested the rezoning application to be placed on a City Council agenda. The moratorium implemented by Cedar Hill never applied to KERA/KDTN's zoning case. Cedar Hill adopted Ordinance No. 97-335 and the moratorium has been lifted. Miller Tower has obtained a building permit under the new tower standards to build a tower in the tower farm.

Denton and the cities contacted by me already have property zoned for towers. It appears some tower owners are unconcerned with the issues relating to a proliferation of towers such as air safety, structural soundness of towers, and the effect of numerous unsightly towers on the aesthetics of a community and the resulting reduction in property value of properties neighboring towers. Lessees of communications towers in the north Texas area, however, are concerned with these issues and have worked with NCTCOG cities to formulate a draft tower ordinance which places new towers out of flight patterns and supports the construction of towers in a manner which allows for co-location of antennas owned by 2 to 3 users on one tower to protect the health, safety, and general welfare of a community. These concerned cities and lessees of tower

space need the assistance of the FCC in mandating co-location guidelines and setting penalties against tower owners who discriminate in the fees they charge lessees desiring to co-locate on a tower with only one lessee.

Michael A. Bucek

Subscribed and sworn to before me by Michael A. Bucek on the 26th day of November, 1997.

STEPHANIE FORD
Notary Public
State of Texas
Comm. Expires 2-19-2001

Stephanie Ford
Notary Public, State of Texas

# ATTACHMENT B

# AFFIDAVIT FROM JOHN L. STOFFEL, JR.

**Before the**
**FEDERAL COMMUNICATION COMMISSION**
**Washington, D.C. 20054**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Petition for Declaratory Ruling | ) | DA 96-2140 |
| of the Cellular Telecommunications | ) | FCC 97-264 |
| Industry Association | ) | |

**AFFIDAVIT**

I, John L. Stoffel, Jr., being duly sworn, deposes and says:

1. I am an assistant City Attorney for the City and County of Denver, Colorado ("Denver") and represented Denver at all times pertinent hereto.

2. In September of 1986, Bear Creek Development Corporation filed an application with the Jefferson County Planning Commission requesting a Special Use Permit to build a communications tower on Mt. Morrison. Denver's communication system, including both receivers and transmitters, were located within 500 feet of the proposed tower. Believing that the introduction of additional radio transmitting equipment at this location would be detrimental to Denver's Public Safety communication system, Denver oppose the new towers. After a public hearing the County Commissioners of Jefferson County, Colorado granted the Special Use permit requested and Denver appealed this decision to the District Court. The Court reversed the action of the County Commissioners. Bear Creek filed a new application for a Special Use permit that was granted and Denver again appealed to the District Court.

3. From September 1986 through June 1988, Denver, Bear Creek Development Corp., and Twenver Inc., the entity that was to build the tower, engaged in negotiations in an attempt to resolve the conflict. On June 23, 1988, the three entities signed an agreement, which was to resolved the Mt. Morrison radio interference issues. The agreement would put Denver's communication antennas on the new tower and provide Denver with space for its equipment. In 1993, Twenver, Inc. filed a Chapter 11 bankruptcy action. Channel 20 Corporation purchased Twenver's assets and assumed the responsibilities under the agreement.

4. In the Spring of 1994, Roberts Broadcasting Company, during a meeting with Denver officials, announced plans to install TV Channel 14's transmitting equipment and antennas on the Mt. Morrison tower. Roberts Broadcasting Company pledged their full cooperation in resolving any interference

problems. As a result of these assurances Denver did not object to the installation of the equipment in spite of the concerns of the police department's communication experts that any further transmitters would likely cause interference with Denver's communication.

5. In September of 1995, discussions were held with Channel 14, during which plans for initial testing were formulated. Among other things, Channel 14 agreed to give prior notification to Denver whenever their transmitting equipment was to be turned on or power levels increased.

6. When Testing was initiated in October of 1995 Denver experienced interference with its communications caused by intermodulation. By reducing power the interference was eliminated. Testing continued into November when Channel 14 increased its output to full power. This did not conform to the prior notification agreement. When the power increase took place, Denver experienced significant interference. Denver alerted Channel 14 but they refused to decrease the power level. We requested that the local office of the FCC to take action and were informed they could not take any action but could only refer the matter to Washington. I personally called Washington and received no satisfaction. This left us with no alternative. Denver filed suit in Jefferson County District Court requesting a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction based on the Agreement and Stipulation which settled the prior action. As a result, Channel 14 agreed, to reduce the power to a level to approximately 5-10% of full power in order to eliminate interference with our communication.

7. Testing continued through July of 1997 and the interference is still present when the power is increased. In July of 1997, upon approval by the FCC, Channel 14 shifted its carrier frequency 15 Khz in an attempt to solve the problem. The shift improved but did not eliminate the interference when the power level was increased to full power and the power level was again reduced to a point where the interference stopped.

8. As of this date, our technicians continue to work with Channel 14 in an attempt to solve the interference problems. Recently an expert hired by Roberts suggested a possible solution, but so far they have not implemented it.

9. Denver hopes a solution will be found that will eliminate the interference problems. Denver's communication systems not only serve our police, fire and paramedic ambulance services but also serves as the link between the emergency communications throughout the metropolitan area. The Civil Air Patrol rescue communications and some State emergency communications also operate on the tower in conjunction with Denver's equipment.

10. In my extensive communication with the staff of the FCC, no one could advise me how Denver could get notice of any applications for the installation

of new equipment at or near our communication equipment. Having to go to Washington to attempt to solve an interference problem has been ineffective and a time-consuming activity. Additionally no provision is made for local participation or testimony on an appeal to the FCC nor is there a procedure for taking such testimony. Denver has an appeal process which allows for a public hearing at which evidence and testimony is taken and where an independent board exercising quasi judicial powers, makes findings of fact and issues a written decision. No such due process is provided under the Commissions rules.

11. Without local authority over zoning Denver would have been unable to protect its emergency communication systems.

12. Further deponent says not.

John L. Stoffel, Jr.
Assistant City Attorney,
City and County of Denver
1445 Cleveland Place, Suite 300
Denver, Colorado 80202
(303) 640-3611

STATE OF COLORADO )
)ss.
COUNTY OF DENVER )

Subscribed to and sworn before me by John L. Stoffel, Jr. this 20th day of November, 1997.

Witness my hand and official seal.

NOTARY PUBLIC

Seal

JUDITH M. SALAS NOTARY PUBLIC STATE OF COLORADO

My commission expires: _____

MY COMMISSION EXPIRES:
August 5, 2000

# ATTACHMENT C

# FCC STATE AND LOCAL GOVERNMENT ADVISORY COMMITTEE RECOMMENDATION NUMBER 2

**FCC Local and State Government Advisory Committee**

Advisory Recommendation Number 2:

**Notification to States and Localities Named in Commission Proceedings**

1. In several recent instances, the actions of particular states or localities have been cited in a petition for rule making or declaratory ruling that would preempt state or local authority nationwide. In some cases, the jurisdictions cited as an example of a problem the petitioner believes requires federal preemption have had no knowledge of the petition. The LSGAC believes the failure to serve cited local and state governments leads to misunderstanding of local and state interests and interferes with the Commission's ability to act in the public interest to balance local and state interests with the interests of industry petitioners.

2. Two recent examples illustrate the problem that concerns the LSGAC.

A. On December 16, 1996, the Cellular Telecommunications Industry Association (CTIA) filed a Petition for Declaratory Ruling (DA96-2140) seeking to preempt zoning moratoria adopted by a number of local governments. These local governments were individually identified within the petition. The CTIA did not serve this Petition on the cited jurisdictions. Although Chairman Hundt sent a letter of inquiry to some of the cited jurisdictions, others were not contacted and may still be unaware that their actions have been cited as justifying federal preemption of local governments across the nation.

B. On May 30, 1997, The National Association of Broadcasters filed a Petition for Further Notice of Proposed Rule Making seeking to preempt local regulation over the siting and construction of broadcast transmission facilities. Actions by five local governments were described as justifying this request. These jurisdictions were not served with a copy of the Petition. Two of the cited jurisdictions became aware of the Petition only because they have representatives who serve on the LSGAC.

4. Few local and state governments have the resources to practice regularly before the Federal Communications Commission. The Commission is a distant, unfamiliar and costly forum for most local and state governments. In contrast, industry interests are well-represented before the Commission on a daily basis.

5. The failure of industry petitioners to serve petitions seeking to preempt local and state authority on jurisdictions cited in such petitions fosters misunderstanding about the concerns of local and state governments. This failure leads the Commission to rely on factual assertions that may be inaccurate or misleading or that may be contested by the jurisdictions cited. The public interest is not well-served by Commission action that reflects detailed knowledge of only one side of a dispute.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends that the Commission amend its procedural rules to require that any petition citing the actions of a

particular local or state government as a basis for federal preemption be served on each cited jurisdiction.

Adopted by the LSGAC on June 27, 1997

_____

Kenneth S. Fellman
Chairman, LSGAC